

43
44 F. Replenishing the San Bernardino Basin Area or other groundwater basins with recycled
45 water is consistent with article X, section 2 of the California Constitution, which requires that the
46 water resources of California be used to the fullest extent of which they are capable and is also
47 consistent with Water Code section 13576(k), which authorizes and encourages the use of
48 recycled water for groundwater replenishment. Groundwater replenishment is also within the
49 authority of both Parties.

50
51 G. The Parties wish to memorialize their agreements relating to constructing and operating a
52 wastewater treatment plant (the “**Project**”) that will enable them to replenish the groundwater
53 resources that serve their respective ratepayers.

54
55 Agreements

56
57 1. *Governance – Joint Management.*

58 a. The Parties agree that they will work together in good faith to complete the
59 construction of the Project no later than June 30, 2018_.

60 b. The Parties will then promptly enter into an agreement for the operation of the
61 Project with a term of at least ten years that will enable the Parties to replenish the
62 San Bernardino Basin Area with at least 6,000 acre-feet of recycled water.

63 c. In accomplishing these objectives, the Project will be managed by a Management
64 Committee composed of the General Manager of EVWD and the General
65 Manager of Valley District, or their designees. All decisions shall be made on a
66 unanimous basis.

67 d. Both Parties hereby authorize their respective General Managers or designees to
68 develop any administrative and operating rules and procedures that may be
69 needed to implement the terms of this Agreement and that do not require a change
70 in the terms of the Agreement without subsequent action by the Parties’ governing
71 boards.

72 2. *Construction of Wastewater Treatment Plant.* The Parties agree that Valley District shall
73 serve as the lead agency for the construction and operation of the Project, as follows:

74 a. *Assignment of Consulting Agreements and Permits by EVWD to Valley District.*
75 Within thirty days of the effective date of this Agreement, EVWD shall assign all
76 existing consulting or other agreements other than legal, as well as any permits,
77 easements or other approvals, relating to the construction of the Project or its
78 subsequent operation to Valley District.

- 79 (1) In the event that Valley District determines, in its sole discretion, that it
80 needs to retain additional consultants in order to fulfill its obligations
81 under the terms of this Agreement, Valley District may retain such
82 consultants without the prior consent of EVWD. Valley District shall,
83 however, provide a copy of such newly retained consultant's budget,
84 scope of work and retainer agreement to EVWD within thirty days of such
85 consultant's retention.
- 86 (2) The Parties understand and agree that, throughout the construction and
87 operation of the Project, each Party will continue to be represented by its
88 own regular legal counsel. The Parties will, within thirty days of the
89 execution of this Agreement, enter into a joint defense/common interest
90 doctrine agreement that will enable them to proceed with the Project in the
91 most expeditious manner possible.
- 92 b. *Design-Build and Project Permitting.* Valley District shall design, permit and
93 construct the Project by means of one or more design/build contracts, as
94 authorized by Public Contracts Code sections 22160 *et seq.* Specifically:
- 95 (1) *Design Proposal.* Valley District shall work with one or more firms to
96 develop a design/build proposal for review and approval by EVWD no
97 later than April 30, 2016.
- 98 (a) The wastewater treatment plant shall be built on APNs 0279-211-
99 33-0000, 0279-211-25-0000, 0279-211-26-0000 and 0279-211-01-
100 0000, which are owned by EVWD. To the extent that additional
101 easements are needed by Valley District or entities acting under
102 Valley District's direction in order to complete the Project, EVWD
103 agrees to issue such easements over its own property or to be
104 responsible for obtaining such easements from neighboring
105 landowners.
- 106 (b) EVWD shall review the design/build proposal and approve it (with
107 or without changes) within thirty days of submission. If EVWD
108 fails to approve the proposal in a timely manner, Valley District
109 may, in its sole discretion, deem this Agreement to have been
110 terminated.
- 111 (2) *Permitting.* Valley District shall be responsible for obtaining all local,
112 state or federal permits that may be necessary for the construction or
113 operation of the Project in a timely manner.

- 114 (a) Such permits shall include, but are not limited to, NPDES permits,
115 other permits necessary to use recycled water to replenish the San
116 Bernardino Basin Area, and the permits needed to allow for the
117 continued discharge of treated wastewater either to the Santa Ana
118 River or other appropriate discharge points.
- 119 (b) Valley District shall also be the lead agency for the preparation of
120 one or more environmental document(s) that may be required
121 under the terms of the National Environmental Policy Act and/or
122 the California Environmental Quality Act that are sufficient to
123 support the issuance of the necessary permits for the Project.
- 124 (3) *Construction.* Valley District shall cause the Project to be constructed in a
125 timely manner. The Parties anticipate that the Project shall be completed
126 by June 30, 2018. Valley District shall provide monthly updates to
127 EVWD on changes to the plans, specifications, and schedules. Valley
128 District shall not be liable for any delays or additional costs in
129 constructing the Project, save for the gross negligence, intentional acts and
130 willful misconduct of Valley District and its employees, agents and
131 contractors.
- 132 (4) *Award of Contract.* Valley District shall obtain the concurrence of EVWD
133 prior to awarding any contract for the construction of the Project. EVWD
134 agrees not to unreasonably delay its approval of any proposed contract.
- 135 (5) *Costs.* The Parties agree that the construction of the Project will occur at
136 no cost to Valley District. Valley District shall be entitled to recover all of
137 its costs (including, but not limited to, materials costs; consultants, experts
138 and attorneys' fees; and direct expenditures) from EVWD for the
139 construction of the Project, save for costs directly caused by the gross
140 negligence, intentional acts and willful misconduct of Valley District and
141 its employees, agents and contractors.
- 142 (6) *Mark-Up of Costs.* EVWD shall pay all costs incurred by Valley District
143 in connection with the Project without any mark-up, including that EVWD
144 shall pay Valley District's reasonable staff time for work related to the
145 Project.
- 146 (7) *Payments Obligatory.* EVWD shall make all payments required by this
147 Agreement as they become due, notwithstanding any individual default by
148 its customers or users, any dispute over charges, or otherwise.

149 c. *Financing.* EVWD agrees that it will finance the full costs of all work associated
150 with or required by the Project and may make any arrangements that it deems
151 appropriate for such financing without the consent of Valley District. EVWD
152 shall keep Valley District reasonably informed as to the status of such financing.
153 Valley District will cooperate, and may assist in other ways at its discretion, with
154 EVWD's efforts to secure financing for the Project to the extent that cooperation
155 is reasonable and necessary.

156 3. *Operation of Wastewater Treatment Plant for Groundwater Replenishment.* The Parties
157 shall enter into the operations agreement for the wastewater treatment plant and for
158 groundwater replenishment referred to in paragraph 1 above no later than thirty days
159 after the completion of the construction of the wastewater treatment plant. Such
160 operations agreement shall include the following terms:

161 a. *Term*

162 (1) The operations agreement shall be for an initial term of ten years, with
163 subsequent terms of five years each. Either Party may terminate the
164 operations agreement with at least one year's written notice prior to the
165 completion of either the initial term or a subsequent term, but if no such
166 termination notice is received in a timely manner, the operations
167 agreement shall automatically renew for another five year period.

168 (2) Notwithstanding the previous subparagraph, if the San Bernardino County
169 Local Agency Formation Commission activates EVWD's authority to
170 provide wastewater treatment services to its ratepayers (Activation), this
171 Agreement shall be deemed terminated in its entirety, effective on the date
172 of Activation and neither Party to this Agreement shall have any further
173 obligation hereunder except for those obligations which have accrued as of
174 the date of Activation. EVWD may succeed to Valley District's
175 obligations to operate the wastewater treatment plant by providing Valley
176 District with one year's written notice of such succession.

177 b. *Operation of the Wastewater Treatment Plant.* Valley District shall operate the
178 wastewater treatment plant, ~~or cause it to be operated by a subcontractor,~~ in a
179 good and workmanlike fashion, in full compliance with all applicable local, state
180 and federal laws and regulations.

181 (1) EVWD shall arrange, at its sole cost, for the collection and conveyance of
182 wastewater generated within EVWD's service area to the wastewater
183 treatment plant.

184 (2) EVWD shall pay all costs incurred by Valley District for the operation of
185 the wastewater treatment plant (including staff time). Valley District shall
186 invoice EVWD quarterly in arrears and EVWD shall pay Valley District
187 within thirty days of the date of each invoice.

188 c. *Public Education.* EVWD may construct facilities ancillary to the Project for the
189 purpose of public education and programming on topics including water
190 conservation and replenishment; Valley District will not object to the construction
191 and operation of such public education facilities and the conduct of such
192 programs, *provided that* such facilities and programs are conducted in such a way
193 so as not to interfere with the ongoing operations of the wastewater treatment
194 plant.

195 4. *Groundwater Replenishment with Recycled Water.* The Parties agree that any recycled
196 water produced by the wastewater treatment plant shall be the sole property of EVWD.

197 5. *Facility Ownership.* EVWD shall own, in fee simple, all Project facilities *provided that*
198 until EVWD completes payment of all construction costs to Valley District, Valley
199 District shall be deemed to have a security interest in those facilities in an amount equal
200 to the unpaid debt. In the event of a default in required payment by EVWD, the Parties
201 agree that Valley District shall have the right to obtain a judgment in the amount of any
202 default by EVWD and shall further have the right to cause EVWD to increase its water
203 charges or to levy an assessment to pay the amount of the default.

204 6. *Indemnification*

205 a. *Indemnification by Valley District.* Valley District shall indemnify, defend and
206 hold harmless EVWD, its directors, officers, attorneys, employees and agents
207 from and against all damages, liabilities, claims, actions, demands, costs and
208 expenses (including, but not limited to, costs of investigations, lawsuits and any
209 other proceedings whether in law or in equity, settlement costs, attorneys' fees
210 and costs), and penalties or violations of any kind, which arise out of, result from,
211 or are related to Valley District's performance of its obligations under this
212 Agreement.

213 b. *Indemnification by EVWD.* EVWD shall indemnify, defend and hold harmless
214 Valley District, its directors, officers, attorneys, employees and agents from and
215 against all damages, liabilities, claims, actions, demands, costs and expenses
216 (including, but not limited to, costs of investigations, lawsuits and any other
217 proceedings whether in law or in equity, settlement costs, attorneys' fees and
218 costs), and penalties or violations of any kind, which arise out of, result from, or
219 are related to the performance of EVWD's obligations under this Agreement.

220 c. *Indemnification Procedures.* Any Party that is an indemnified party (the
 221 "**Indemnified Party**") that has a claim for indemnification against the other Party
 222 (the "**Indemnifying Party**") under this Agreement, shall promptly notify the
 223 Indemnifying Party in writing, *provided, however*, that no delay on the part of the
 224 Indemnified Party in notifying the Indemnifying Party shall relieve the
 225 Indemnifying Party from any obligation unless (and then solely to the extent) the
 226 Indemnifying Party is prejudiced. Further, the Indemnified Party shall promptly
 227 notify the Indemnifying Party of the existence of any claim, demand, or other
 228 matter to which the indemnification obligations would apply, and shall give the
 229 Indemnifying Party a reasonable opportunity to defend the same at its own
 230 expense and with counsel of its own selection, *provided* that the Indemnified
 231 Party shall at all times also have the right to fully participate in the disputed
 232 matter at its own expense. If the Indemnifying Party, within a reasonable time
 233 after notice from the Indemnified Party, fails to defend a claim, demand or other
 234 matter to which the indemnification obligations would apply, the Indemnified
 235 Party shall have the right, but not the obligation, to undertake the defense of, and
 236 to compromise or settle (exercising reasonable business judgment), the claim or
 237 other matter, on behalf, or for the account, and at the risk, of the Indemnifying
 238 Party. If the claim is one that cannot by its nature be defended solely by the
 239 Indemnifying Party, then the Indemnified Party shall make available all
 240 information and assistance to the Indemnifying Party that the Indemnifying Party
 241 may reasonably request.

242 7. *Administration of Agreement*

243 a. *Books and Records.* Each Party shall have access to and the right to examine any
 244 of the other Party's pertinent books, documents, papers or other records
 245 (including, without limitation, records contained on electronic media) relating to
 246 the performance of that Party's obligations pursuant to this Agreement or the
 247 Project.

248 (1) *Retention of Records; Preservation of Privilege.* Each Party shall retain
 249 all such books, documents, papers or other records to facilitate such
 250 review in accordance with that Party's record retention policy. Access to
 251 each Party's books and records shall be during normal business hours
 252 only. Nothing in this paragraph shall be construed to operate as a waiver
 253 of any applicable privileges.

254 (2) *Outside Auditors.* Any Party may, at any time and at its sole cost, hire an
 255 auditor to examine the accounting for work performed pursuant to this
 256 Agreement. The Parties may also agree to retain an independent auditor to
 257 review the accounting for work performed pursuant to this Agreement.
 258 The costs of such an auditor will be shared equally between the Parties.

259 b. *Disputes.* The Parties recognize that there may be disputes regarding the
 260 obligations of the Parties or the interpretation of this Agreement. The Parties
 261 agree that they may attempt to resolve disputes as follows:

262 (1) *Statement Describing Alleged Violation or Interruption of Agreement.* A
 263 Party alleging a violation or interruption of this Agreement (the
 264 “**Initiating Party**”) shall provide a written statement describing all facts
 265 that it believes constitute a violation or interruption of this Agreement to
 266 the Party alleged to have violated or interrupted the terms of this
 267 Agreement (the “**Responding Party**”).

268 (2) *Response to Statement of Alleged Violation or Interruption.* The
 269 Responding Party shall have sixty days from the date of the written
 270 statement to prepare a written response to the allegation of a violation or
 271 interruption of this Agreement and serve that response on the Initiating
 272 Party or to cure the alleged violation or interruption to the reasonable
 273 satisfaction of the Initiating Party. The Initiating Party and the
 274 Responding Party shall then meet within thirty days of the date of the
 275 response to attempt to resolve the dispute amicably.

276 (3) *Mediation of Dispute.* If the Initiating Party and the Responding Party
 277 cannot resolve the dispute within ninety days of the date of the written
 278 response, they shall engage a mediator, experienced in water-related
 279 disputes, to attempt to resolve the dispute. Each Party shall ensure that it
 280 is represented at the mediation by a member of its Board of Directors.
 281 These representatives of the Initiating Party and the Responding Party may
 282 consult with staff and/or technical consultants during the mediation and
 283 such staff and/or technical consultants may be present during the
 284 mediation. The costs of the mediator shall be divided equally between the
 285 Initiating Party and the Responding Party.

286 (4) *Prior to Claims Under California Tort Claims Act.* The Parties agree that
 287 the procedure described in this paragraph 7.b represents an effort to
 288 resolve disputes without the need for a formal claim under the California
 289 Tort Claims Act or other applicable law. The period of time for the
 290 presentation of a claim by one Party against another shall be tolled for the
 291 period from the date on which the Initiating Party files a written statement
 292 until the date upon which the mediator renders a decision.

293 (5) *Reservation of Rights.* Nothing in this paragraph 7.b shall require a Party
 294 to comply with a decision of the mediator and, after the completion of the
 295 mediation process described above, each Party shall retain and may
 296 exercise at any time all legal and equitable rights and remedies it may

297 have to enforce the terms of this Agreement; provided, that prior to
298 commencing litigation, a Party shall provide at least five calendar days'
299 written notice of its intent to sue to the other Party.

300 8. *General Provisions.*

301 a. *Authority.* Each signatory of this Agreement represents that s/he is authorized to
302 execute this Agreement on behalf of the Party for which s/he signs. Each Party
303 represents that it has legal authority to enter into this Agreement, to perform all
304 obligations under this Agreement and that any and all appropriate Board action
305 necessary for approval of this Agreement has been taken. .

306 b. *Amendment.* This Agreement may be amended or modified only by a written
307 instrument executed by each of the Parties to this Agreement.

308 c. *Jurisdiction and Venue.* This Agreement shall be governed by and construed in
309 accordance with the laws of the State of California, except for its conflicts of law
310 rules. Any suit, action, or proceeding brought under the scope of this Agreement
311 shall be brought and maintained to the extent allowed by law in the County of San
312 Bernardino, California.

313 d. *Headings.* The paragraph headings used in this Agreement are intended for
314 convenience only and shall not be used in interpreting this Agreement or in
315 determining any of the rights or obligations of the Parties to this Agreement.

316 e. *Construction and Interpretation.* This Agreement has been arrived at through
317 negotiations and each Party has had a full and fair opportunity to revise the terms
318 of this Agreement. As a result, the normal rule of construction that any
319 ambiguities are to be resolved against the drafting Party shall not apply in the
320 construction or interpretation of this Agreement.

321 f. *Entire Agreement.* This Agreement constitutes the entire agreement of the Parties
322 with respect to the subject matter of this Agreement and, save as expressly
323 provided in this Agreement, supersedes any prior oral or written agreement,
324 understanding, or representation relating to the subject matter of this Agreement.

325 g. *Partial Invalidity.* If, after the date of execution of this Agreement, any provision
326 of this Agreement is held to be illegal, invalid, or unenforceable under present or
327 future laws effective during the term of this Agreement, such provision shall be
328 fully severable. However, in lieu thereof, there shall be added a provision as
329 similar in terms to such illegal, invalid or unenforceable provision as may be
330 possible and be legal, valid and enforceable.

- 331 h. *Successors and Assigns.* This Agreement shall be binding on and inure to the
332 benefit of the successors and assigns of the respective Parties to this Agreement.
333 No Party may assign its interests in or obligations under this Agreement without
334 the written consent of the other Parties, which consent shall not be unreasonably
335 withheld or delayed.

- 336 i. *Waivers.* Waiver of any breach or default hereunder shall not constitute a
337 continuing waiver or a waiver of any subsequent breach either of the same or of
338 another provision of this Agreement and forbearance to enforce one or more of
339 the rights or remedies provided in this Agreement shall not be deemed to be a
340 waiver of that right or remedy.

- 341 j. *Attorneys' Fees and Costs.* The prevailing Party in any litigation or other action
342 to enforce or interpret this Agreement shall be entitled to reasonable attorneys'
343 fees, expert witnesses' fees, costs of suit, and other and necessary disbursements
344 in addition to any other relief deemed appropriate by a court of competent
345 jurisdiction.

- 346 k. *Necessary Actions.* Each Party agrees to execute and deliver additional
347 documents and instruments and to take any additional actions as may be
348 reasonably required to carry out the purposes of this Agreement.

- 349 l. *Compliance with Law.* In performing their respective obligations under this
350 Agreement, the Parties shall comply with and conform to all applicable laws,
351 rules, regulations and ordinances.

- 352 m. *Third Party Beneficiaries.* This Agreement shall not create any right or interest in
353 any non-Party or in any member of the public as a third party beneficiary.

- 354 n. *Counterparts.* This Agreement may be executed in one or more counterparts,
355 each of which shall be deemed to be an original, but all of which together shall
356 constitute but one and the same instrument.

- 357 o. *Notices.* All notices, requests, demands or other communications required or
358 permitted under this Agreement shall be in writing unless provided otherwise in
359 this Agreement and shall be deemed to have been duly given and received on: (i)
360 the date of service if served personally or served by facsimile transmission on the
361 Party to whom notice is to be given at the address(es) provided below, (ii) on the
362 first day after mailing, if mailed by Federal Express, U.S. Express Mail, or other
363 similar overnight courier service, postage prepaid, and addressed as provided
364 below, or (iii) on the third day after mailing if mailed to the Party to whom notice
365 is to be given by first class mail, registered or certified, postage prepaid,
366 addressed as follows:

368 *Notice to San Bernardino Valley Municipal Water District*

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Douglas Headrick, General Manager
SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT
380 East Vanderbilt Way, San Bernardino, CA 92408
Phone: (909) 820-3701
Email: douglash@sبvmwd.com

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David R.E. Aladjem
DOWNEY BRAND LLP
621 Capitol Mall, Sacramento, CA 95814
Phone: (916) 520-5361
Email: daladjem@downeybrand.com

380 *Notice to East Valley Water District*

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John Mura, General Manager/CEO
EAST VALLEY WATER DISTRICT
31111 Greenspot Rd., Highland, CA 92346
Phone: 909-889-9501
Email: john@eastvalley.org

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Jean Cihigoyenetché
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392 **SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT**

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By: _____
~~Mark Bulot~~ Susan Longville
President, Board of Directors

Dated: _____

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By: _____
~~Gil Navarro~~ Steve Copelan, Secretary

Dated: _____

403 APPROVED AS TO FORM

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405 By: _____ Dated: _____
406 David R.E. Aladjem, Esq.
407 Downey Brand, LLP
408 Counsel for **San Bernardino Valley Municipal Water District**
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411 **EAST VALLEY WATER DISTRICT**

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413 By: _____ Dated: _____
414 ~~James Morales, Jr.~~ Chris Carrillo
415 Chairman of the Board
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418 By: _____ Dated: _____
419 John Mura, General Manager/CEO

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421 APPROVED AS TO FORM

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423 By: _____ Dated: _____
424 Jean Cihigoyenetché
425 ~~Cihigoyenetché Grossberg & Clouse~~ The JC Law Firm
426 Counsel for **East Valley Water District**